No. 89-1041

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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STATE OF MISSISSIPPI and
MISSISSIPPI PUBLIC SERVICE COMMISSION,
*Petitioners,*

v.

FEDERAL ENERGY REGULATORY COMMISSION,
*Respondent.*

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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## BRIEF FOR THE ARKANSAS PUBLIC SERVICE COMMISSION IN OPPOSITION

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App

## QUESTION PRESENTED

Whether a Federal Energy Regulatory Commission order, allocating an interstate utility system's nuclear plant investment costs among all the system's operating companies, is "unduly discriminatory" within the meaning of Sections 205 and 206 of the Federal Power Act, when the order results in ratepayers in several states paying the costs of a nuclear power plant owned by a generating subsidiary of a multistate public utility holding company.

## PARTIES IN THE PROCEEDINGS BELOW

The Arkansas Public Service Commission was a Petitioner in the Court of Appeals for the District of Columbia Circuit. The other parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

(a) *Petitioners*:

1. Arkansas Public Service Commission.
2. State of Arkansas.
3. Arkansas-Missouri Congressional Delegation.
4. Missouri Public Service Commission.
5. Reynolds Metals Company.
6. Associated Industries of Arkansas.
7. Riceland Foods, Inc.
8. Weyerhaeuser Company.
9. State of Mississippi.
10. Mississippi Public Service Commission.
11. City of New Orleans.

(b) *Respondent*:

1. Federal Energy Regulatory Commission.

(c) *Intervenors*:

All Petitioners above, and:

1. Jefferson Parish, Louisiana.
2. State of Louisiana.
3. Louisiana Public Service Commission.

4. Occidental Chemical Corporation.
5. Georgia Gulf Corporation.
6. System Energy Resources, Inc.

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## BRIEF FOR ARKANSAS PUBLIC SERVICE COMMISSION IN OPPOSITION

---

The Arkansas Public Service Commission, a party to the proceeding below, respectfully prays that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit filed by the State of Mississippi and the Mississippi Public Service Commission on December 27, 1989, be denied.

### OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit that is the subject of the Petition for a Writ of Certiorari was issued on May 26, 1989. *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989).

On January 6, 1987, a related opinion by the court below, *Mississippi Industries v. FERC*, 808 F.2d 1525 (D.C. Cir. 1987), was issued. Three petitions for certiorari to the court below were denied. *Arkansas Public Service Comm'n, et al., v. FERC*, 484 U.S. 985 (1987).

On June 24, 1987, the court below, *en banc*, denied suggestions for rehearing *en banc*. *Mississippi Industries v. FERC*, 822 F.2d 1103 (D.C. Cir. 1987). On the same date, the panel originally hearing this case issued an order, *Mississippi Industries v. FERC*, 822 F.2d 1104 (D.C. Cir. 1987), which vacated its denial of rehearing, granted rehearing, vacated portions of its January 6, 1987 opinion, and remanded the case to the Federal Energy Regulatory Commission ("FERC" or "Commission") for reconsideration in light of certain issues raised by a concurring and dissenting opinion by Circuit Judge Bork, which had been filed with the original opinion.

On remand, the FERC issued two opinions, both *sub nom. System Energy Resources, Inc.*, Opinion No. 292, 41 FERC ¶ 61,238 (November 30, 1987), *reh'g denied*, Opinion No. 292-A, 42 FERC ¶ 61,091 (January 29, 1988). An appeal of these orders to the United States Court of Appeals for the District of Columbia Circuit resulted in the opinion and judgment that are the subject of the pending Petition for Writ of Certiorari.

## JURISDICTION

The judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit were entered on May 26, 1989. A petition for rehearing and suggestion for rehearing *en banc* were

denied on August 28, 1989. On November 14, 1989, the Chief Justice of this Court ordered that the time for filing a petition for certiorari be extended to and include December 27, 1989. Such a petition was filed by the State of Mississippi and the Mississippi Public Service Commission on December 27, 1989. On January 23, 1990, the time for filing responses to the petition was enlarged to and including February 28, 1990, and was subsequently enlarged to and including March 28, 1990.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this proceeding are Sections 205 and 206 of the Federal Power Act (Part II), 16 U.S.C. §§ 824d and 824e (1988).

16 U.S.C. § 824d(a)

> (a) *Just and reasonable rates.* All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

16 U.S.C. § 824d(b)

> (b) *Preference or advantage unlawful.* No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue

preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

16 U.S.C. § 824e(a)

(a) *Unjust or preferential rates, etc.* Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force and shall fix the same by order.

## STATEMENT OF THE CASE

The factual background and procedural events leading to the petition for certiorari have been before this Court on three occasions, in *Arkansas Public Service Comm'n, et al. v. FERC*, 484 U.S. 985 (1987), in *Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354 (1988) (wherein this Court reviewed the relevant facts in some detail), and in *New Orleans Public Service, Inc. v. New Orleans*, ___ U.S. ___, 109 S.Ct. 2506 (1989). In the interest of brevity, a full description of the facts will not be repeated herein.



The order of the United States Court of Appeals for the District of Columbia Circuit, for which a writ of certiorari is sought, found, on the record properly before that court, that the Commission had fully and adequately reconsidered, on remand, its decision to equalize the capacity costs of all nuclear plants on the Middle South system, that it had adequately explained its criteria for determining what constitutes "undue discrimination", and that it had rendered a judgment that was not unduly discriminatory. *City of New Orleans v. FERC*, 875 F.2d 903 (D.C. Cir. 1989), App. at 8a-9a.

The FERC's decisions on remand[1] were based on the full record in this proceeding, including Petitioners' long-standing contentions that the FERC reallocation formula is unduly discriminatory and violates the Federal Power Act's proscription of undue discrimination. The Commission's decisions also confirmed earlier decisions that were based on record evidence showing that all of the nuclear plants on the system provided benefits to all members of the system. *System Energy Resources, Inc.*, 41 FERC at

[1] The Arkansas Public Service Commission does not argue that the decisions below or the decisions of the FERC are correct. Rather, the Arkansas Public Service Commission has consistently argued that the FERC was without jurisdiction to modify the allocation of power from, and the costs of, the Grand Gulf Plant contained in the Unit Power Sales Agreement, and that the Arkansas Power & Light Company should not be allocated any portion of the Grand Gulf Plant. In this Brief in Opposition, the Arkansas Public Service Commission argues that the decisions below are not unduly discriminatory to the customers of Mississippi Power & Light Company.

61,619, App. at 35a; *System Energy Resources, Inc.*, 42 FERC at 61,425, App. at 42a.

## REASONS FOR DENYING THE WRIT

### I. Petitioners' Factual Analysis is Erroneous.

Petitioners base the substance and great weight of their argument that the formula adopted by the FERC for the allocation of the Grand Gulf Plant is unduly discriminatory to Mississippi ratepayers, on a factual assumption which has been rejected, and for which they provide no citation to any support in the record.

Petitioners urge that the Court of Appeals has abdicated its responsibility to review the discriminatory impact of the FERC's decision in part because it did not adopt an alternate allocation formula that would allocate only the costs of the Grand Gulf Plant among the operating companies, and not the costs of the Grand Gulf Plant in combination with the costs of the other nuclear plants on the Middle South system. An allocation of only the costs of the Grand Gulf Plant would be appropriate, according to Petitioners, because " . . . Grand Gulf is the only nuclear power unit in the MSU system that benefits or contributes to the needs of all four operating companies. . . ." Petition at 7. Petitioners note that such a formula was proposed early in the original proceedings, but rejected by the Commission. *Id.* Petitioners assert that under the cost allocation formula ordered by the FERC, and affirmed by the court below, Mississippi Power & Light Company (MP&L) and New Orleans Public Service, Inc. (NOPSI), are forced to absorb a share of the costs of three nuclear plants "from which they get no benefits in terms of customer usage". *Id.* at 9.

This approach was indeed rejected by the Commission, which found that all of the nuclear plants on the Middle South system were built for the benefit of the entire system. App. at 28a, 44a. In addition, the FERC found that customers of MP&L and NOPSI would benefit from the availability of a greater fuel mix, economies of scale in building new generation, reductions in reserve requirements, increased reliability, and efficiencies in operation. App. at 35a.

Petitioners offer no suggestion that there is evidence in the record that such benefits do not exist. Instead, Petitioners merely deplore that the court below did not conduct a more in-depth review of the FERC's decision, and in so doing, question the rationality and discriminatory nature of the resulting impact on consumers located in various states. Petition at 14. Petitioners merely assert that the court below should have revisited an issue that had long before been decided on a complete record, and, significantly, fail to cite any record evidence in support of their claim that customers of NOPSI and MP&L do not benefit from the Middle South system's nuclear plants. This does not provide adequate grounds for the granting of a writ of certiorari.

**II. The United States Court of Appeals for the District of Columbia Circuit Did Not Abdicate its Responsibility for Judicial Review.**

Petitioners claim that review by this Court is necessary because the court below has shown "total deference to an administrative ratemaking decision", which approach they claim is "at odds with this Court's precedents". Petition at 15. In Petitioners' review of this Court's precedents enunciating the applicable standards for judicial review of the FERC's

actions, however, they focus on only one phrase—"the total effect of the rate order"—to argue that the court below has "abdicated its limited but essential review function under the Federal Power Act." *Id.* at 16. Petitioners argue that, while the court below has undeniably reviewed this controversy on multiple occasions, it has neglected to consider the total impact of the FERC's final order on electric consumers in Mississippi. *Id.*

Significantly, Petitioners do not clearly identify error on the part of the court below in its review of the FERC's opinions and orders on remand. Petitioners note the well-established rule that a reviewing court is not empowered to substitute a formula which it considers more appropriate for one selected by the agency under review. They also admit the limited scope of judicial review under this Court's precedents, which permit the reviewing court to examine the impact of the order to ensure that it is within a zone of reasonableness, that it is not arbitrary, that it is not unjust or unreasonable, and that it is supported by substantial evidence and reached through reasoned decision-making. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-168 (1962); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944); *Federal Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585-586 (1942). Petition at 16. Petitioners do not suggest that the court below has overstepped its limited role, but that it has not gone far enough in its review: the court below has not, Petitioners claim, examined "the total effect" of the FERC's orders.

Were it to do so, however, under Petitioners' Statement of the Facts, the court below would necessarily

have to examine anew, at this final juncture of these lengthy proceedings, the impact of the alternative formula that, while rejected by the FERC, is still being proposed by Petitioners as a demonstration of undue discrimination. Such a requirement would itself be an invitation for the court below to intrude into areas where it should not go: *i.e.*, to replace the FERC's decision with its own independent analysis, and perhaps to require that the FERC reach a particular result.

Instead of such an undertaking, the court below has stayed within the appropriate standard of judicial review made applicable by the decisions of this Court. It has not, as claimed by Petitioners, demonstrated "total deference" to an administrative ratemaking decision, but instead has scrutinized the FERC's decisions in these cases, and previously remanded the proceeding to the FERC for further analysis and a clearer justification and rationale. The court below has not abdicated its essential review function, and a writ of certiorari to that court should not issue on that ground.

**III. The Asserted Absence of Controlling Precedent in This Court Relating to Interstate, Intra-System Allocations of the Costs of Nuclear Power Plants Does Not Compel a Grant of Certiorari.**

Petitioners assert that this Court has not yet judged a plan such as the system-wide nuclear plant cost allocation formula established by the FERC, against the Federal Power Act's standard that rates should not be "unduly discriminatory", and that therefore certiorari should be granted in this instance in order to satisfy "the need for some definitive articulation of what is and what is not a discriminatory rate struc-

ture". Petition at 18. This perceived need for clarification does not require a grant of certiorari based on the facts presented in this proceeding, however.

The facts underlying the decisions that have been made by the FERC and the court below over the last several years are unique, *i.e.*, the cost allocation of a nuclear power plant owned by a generating subsidiary of a multi-state public utility holding company. The likelihood of the recurrence of identical or similar facts, requiring an investigation into whether an applicable rate is "unduly discriminatory", is small. Whatever precedent would be created by a review by this Court would have limited applicability. In addition, there exists substantial precedent in this Court and other courts on the question and concept of "undue discrimination", as well as the scope of review of specific factual circumstances in the review of administrative decisions. *See, e.g., Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271 (1976); *Federal Power Comm'n v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Boroughs of Ellwood City, Grove City, New Wilmington, Wampum and Zelienople v. FERC*, 731 F.2d 959 (D.C. Cir. 1984); *Alabama Electric Coop., Inc. v. FERC*, 684 F.2d 20 (D.C. Cir. 1982); *Metropolitan Edison Co. v. FERC*, 595 F.2d 851 (D.C. Cir. 1978); *Public Service Co. of Indiana v. FERC*, 575 F.2d 1204 (7th Cir. 1978).

Moreover, the review that is sought by Petitioners of the decision of the court below would require this Court to revisit factual arguments that have been made and rejected repeatedly in these proceedings, in order to make the discrimination determination that

the Federal Power Act has entrusted to the FERC. Such is not the role of this Court.

The lack of specific controlling precedent of this Court is not a compelling reason for the granting of a writ of certiorari.

**IV. Traditional Considerations Governing Review On a Writ of Certiorari Are Absent.**

Under this Court's rules, a petition for a writ of certiorari is discretionary with the Court, and will be granted only when there are special and important reasons therefor. Sup. Ct. R. 10.1. The Court has indicated the character of reasons that, while not determinative, may be considered in its decision as to whether it will exercise its judicial discretion. None are before this Court. Petitioners do not urge that the decision of the court below is in conflict with the decision of another United States Court of Appeals on the same matter. No state court decision is at issue, nor is any claim made by Petitioners of a departure from the accepted and usual course of judicial proceedings. *Id.*

While the considerations included in the rule are not controlling or exhaustive of the full measure of the Court's discretion, Petitioners' failure to demonstrate that even one of the traditional reasons for granting a writ of certiorari is present in its Petition urges against the grant of the writ in this case.

**CONCLUSION**

For the foregoing reasons, the Arkansas Public Service Commission respectfully submits that the Petition for a Writ of Certiorari to the United States Court

of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

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